

Is it extraditable or not?

The House of Lords says this is the question to be answered by courts hearing European arrest warrant cases, irrespective of whether events change, as Michael Caplan reports

THE HOUSE OF LORDS has confirmed that in European arrest warrant cases the court is concerned with whether there is an extraditable offence and not in any circumstances with whether there is *prima facie* evidence to prove it. So that if events change in the case against the accused and the offence cannot be proved, this would be irrelevant. Furthermore the ancient remedy of *habeas corpus* would not be available.

The case of *Farid Hilali* [2008] UKHL 3 raised important issues arising out of the "fast-track" procedure for extradition under the European arrest warrant. According to one national newspaper, the case "is at the centre of a major diplomatic row, amid claims that it was approved on the basis of misleading evidence to Britain's highest court".

Spain had requested Hilali's extradition on a European arrest warrant for participation in a terrorist organisation. The warrant contained a narrative extending to over eight pages of numerous intercepted telephone conversations between Hilali and Barakat Yarkas before and after the 11 September 2001. They were said to lead to the conclusion that Hilali was one of the men who participated in the 9/11 attacks in the US, although he was not one of the suicide pilots. It also said that analysis of telephone conversations made by Yarkas linked Yarkas with the leaders of Al Qaeda.

The order for extradition, signed by the senior district judge in June 2005, was for the extradition offence of participation in a terrorist organisation. Hilali's appeal to the High Court was dismissed in May 2006 and leave to appeal to the House of Lords was refused. The extradition case would have ended there.

However, some time after the European arrest warrant was issued, Yarkas was tried in the High Court of Madrid. In September 2005, he was acquitted of direct involvement of murder but was convicted of other offences. Then in May 2006, his conviction of indirect involvement in the murders was quashed by the Supreme Court in Spain, with the support of prosecution on two grounds. The first was that the telephone intercept evidence was inadmissible as it had

been obtained without lawful authorisation, and the second was that the conversation between Hilali and Yarkas did not support the inference that they were conspiring to commit terrorist attacks in the US.

In November 2006, Hilali began proceedings for *habeas corpus* on the basis that, following the quashing of Yarkas's conviction, "there could no longer be a justification for his continued detention notwithstanding the lawfulness of the original order his extradition". Further, in light of the quashing of the conviction "it was wholly inconsistent for

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the prosecution to seek his return to Spain so that he could be put on trial there for the same offences." The Divisional Court decided that *habeas corpus* was available as there had been a fundamental change to the circumstances, and granted the application.

The issues in the House of Lords were whether it was possible to raise the decision in Yarkas's case to undermine the district judge's ruling that Hilali had been accused of an extradition offence and whether *habeas corpus* was available after the statutory process contained in the Extradition Act 2003 had been exhausted on the basis of a change in circumstances.

Their Lordships concluded that the question of whether there is a case to answer on the conduct that is alleged in the European arrest warrant is not one that can be examined in the requested state. Lord Hope quoted Lord Scott in the *Candos Armos* case to the effect that the merits of the extradition request would be taken on trust and not be investigated by the member state from which extradition was sought.

Lord Hope said: "The question whether the evidence that is relied on to prove the

extradition offence is or is not admissible is for determination by the court in the requesting country when the person is put on trial there for the offence. That was the position in law when the European arrest warrant was before the senior district judge at the extradition hearing. The position in law was not altered by the subsequent events in Spain which indicated that some, most or even all of the evidence relied on to prove the conspiracy was not admissible."

Lord Hope went on to deal with the *habeas corpus* issue. He said that in this case the grounds on which the remedy was sought was contrary to the principle of mutual recognition, "even if evidence about the decision of the Spanish Supreme Court had been available in time for it to have been made part of the statutory appeal, it would not have been open to the High Court to hold that, if that evidence had been before a judge at the extradition hearing, he would have decided the question whether to make the order differently".

The House of Lords made it clear that the admissibility or sufficiency of the evidence is not for determination by a judge in the requested state. "These issues were not within the jurisdiction of a judge at the extradition hearing in this case. The question which he had to decide was whether the offences specified in the warrant was an extraditable offence, not whether it could be proved."

In an interesting postscript to the opinion, their Lordships drew attention to concern over errors in the procedure and emphasised the importance of accuracy and attention to detail in the preparation of the European arrest warrant.

It is, however, clear that at the extradition hearing the district judge will not be concerned whether there is a case to answer or the sufficiency of the evidence in any circumstances. One district judge commented in the course of a hearing recently that if the accused was charged with murder then, even if the alleged victim came into court and sat at the back, the extradition proceedings would continue.

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